No. 9527

In the United States Circuit Court of Appeals for the Ninth Circuit

GILA VALLEY IRRIGATION DISTRICT, FRANKLIN IRRIGATION DISTRICT, ROY A. LAYTON, MILTON LINES, WILLIAM WALDROM, ROY D. WILLIAMS, AND J. D. WILKINS, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES

NORMAN M. LITTELL,
Assistant Attorney General.
FRANK E. FLYNN,
United States Attorney, District of Arizona.
H. S. McCLUSKEY,
CHARLES R. DENNY,
W. ROBERT KOERNER,
Attorneys, Department of Justice.
GERAINT HUMPHERYS,
District Counsel, United States Indian Field Service,
of Counsel.

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CITATIONS

260693—40——1

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OPINION BELOW

The district court did not write an opinion. Its findings, conclusions and order denying appellants' petition appear at R. 26–29.

JURISDICTION

The United States, pursuant to section 24 of the Judicial Code as amended, 28 U. S. C. sec. 41 (1), instituted the original proceeding in this case to obtain an adjudication of its water rights in the Gila River. The original proceeding was terminated by a consent decree

entered June 29, 1935.[1] Article XII of the decree provided for the appointment of a water commissioner and further provided (Decree 112; Appendix 42)—

> that any person, feeling aggrieved by any action or order of the Water Commissioner, * * * may complain to the Court * * * and the Court shall promptly review such action or order and make such order as may be proper in the premises.

On July 5, 1939, appellants filed a petition asking the court to review certain actions of the water commissioner (R. 2–9). On January 22, 1940, the district court entered an order denying the relief requested in the petition (R. 26–29). Notice of appeal was filed March 14, 1940 (R. 29–30). The jurisdiction of this Court is invoked under section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a).

QUESTION PRESENTED

Whether the district court erred in holding that the decree of June 29, 1935, is unambiguous and that the actions of the water commissioner in apportioning water to the appellants were in accordance with the provisions of the decree.

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[1] This decree has not been printed as part of the record but copies prepared by the Government Printing Office have been filed with the Clerk (R. 115–116). In addition, the appellants have printed portions of the decree as an appendix to their brief. For the convenience of the Court this brief will give page references both to the original copies which will be cited as "Decree" and to the appellants' brief which will be cited as "Appendix."

STATEMENT

The United States, on its own behalf and on behalf of the Pima and Apache Indians, instituted the original proceeding in this case to obtain an adjudication of its water rights in the Gila River. By Article XII of its final decree of June 29, 1935, the district court retained jurisdiction for the purpose of reviewing the actions of the water commissioner appointed to enforce the provisions of the decree (Decree 112; Appendix 42). The present appeal arises out of an effort made by the appellants, who were defendants in the original proceedings, to establish that the water commissioner was improperly administering the decree in certain respects (R. 2–8). The court below denied the appellants the relief which they requested and upheld the actions of the water commissioner (R. 26–29). The court stated that the pertinent provisions of the 1935 decree are "clear and unambiguous" and that the water commissioner was acting "in accordance with the * * * decree" (R. 27, 28). The essential facts are as follows:

The Gila River and the San Carlos Reservoir.—The Gila River flows in a general westerly direction from its source in New Mexico, through Arizona to its confluence with the Colorado River at Yuma in western Arizona. Pursuant to the Act of June 7, 1924, c. 288, 43 Stat. 475, the United States constructed a dam in the vicinity of San Carlos, Arizona. This dam, which is known as the Coolidge Dam, impounds water of the Gila River in the San Carlos Reservoir.

The lands embraced within the appellant irrigation districts, and owned by the individual appellants, are located in the Gila River valley in eastern Arizona, and are upstream from the San Carlos Reservoir. Appellants thus designate themselves as the "Upper Valley Users" (Br. 2).

Downstream from the San Carlos Reservoir is the Government's San Carlos Project, which irrigates a large area of Indian lands and lands owned by whites.

The original proceeding and the decree of June 29, 1935.—As has been stated, the purpose of the original proceeding which was brought by the Government in 1925 was to obtain an adjudication of the rights of the various parties to use the waters of the Gila River. The United States on its own behalf and on behalf of certain Indians claimed the right to use a considerable quantity of water on lands located downstream from the San Carlos Reservoir. The various irrigation districts and individuals who claimed the right to divert water above the reservoir were named as defendants. The parties negotiated a settlement which they agreed "should be embodied in and confirmed and made effective" by a court decree (Decree 6; Appendix 1). Such a decree was entered on June 29, 1935 (Decree 113; Appendix 44).

The decree adjudicates to the United States extensive rights to divert the natural flow of the river at points which with one exception are below the reservoir (Arts. V, VI: Decree 12–105; Appendix 2–18). One such right, decreed to the United States on behalf of the Pima Indians of the Gila River Reservation for

the irrigation of 35,000 acres, is of immemorial priority (Art. VI (1): Decree 86; Appendix 8). It is, therefore, prior to all other rights on the river. Another right, decreed to the United States on behalf of the Apache Indians of the San Carlos Reservation for the irrigation of 1,000 acres, has a priority of 1846 (Art. VI (2): Decree 86; Appendix 9).[2] Still other rights adjudicated to the Government were acquired by purchase on behalf of white landowners within the San Carlos Project. In fact, all rights having priorities of between 1846 and 1872 are declared to be in the United States (Decree 14–15). The United States is also determined to have acquired extensive rights subsequent to 1872 which were prior to many of the rights of the upper valley users (Arts. V, VI (3)–(6): Decree 15–72, 86–105; Appendix 5–6, 11–18). In addition to the foregoing rights to divert the *natural flow,* the United States is separately decreed the right to *store* water in the San Carlos Reservoir as of June 7, 1924 (Art. VI (5): Decree 72, 105; Appendix 16).

The rights of all parties to the decree are adjudicated and set out in Article V (Decree 14–72). Certain of

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[2] The early priorities decreed to the United States on behalf of the Pima and Apache Indians were claimed by the United States by virtue of actual prior appropriations and under the principle established in *Winters* v. *United States*, 207 U. S. 564 (1908), and followed in *Skeem* v. *United States*, 273 Fed. 93 (C. C. A. 9, 1921); *United States* v. *Walker River Irrigation District*, 104 F. 2d 334 (C. C. A. 9, 1939); *United States* v. *Hibner*, 27 F. 2d 909, 911 (D. Idaho 1928); *Anderson* v. *Spear-Morgan Livestock Co.*, 107 Mont. 18, 25, 79 P. 2d 667 (1938).

the rights declared to be in the United States are further defined in Article VI (Decree 13, 86; Appendix 6, 8).

Article VIII, the interpretation of which is involved in this case, recites by way of preamble (Decree 106; Appendix 20–22): That the diversions of water from the Gila River by the upper valley defendants, "since their inception have been made under rights which were and are junior and subject to certain extensive rights of plaintiff [the United States] to divert the waters * * * at points below the diversions of said defendants and also below the San Carlos Reservoir." That the earliest right of plaintiff is prior to all the rights of defendants, and certain of plaintiff's other rights are prior to certain of defendants' rights. That plaintiff and defendants, recognizing the desirability of making it practicable for the defendants "to carry on the irrigation of said upper valley lands to the extent to which the areas to which their said rights apply heretofore have been irrigated and so that the said San Carlos Act shall inure in part to their benefit and this suit may be compromised and settled," have agreed upon certain provisions which shall be made part of the decree and binding upon the parties.

The first provision thus agreed upon and embodied in the decree (Art. VIII (2): Decree 106; Appendix 22–25) is that on January 1 of each year, or so soon thereafter as water is stored in the San Carlos Reservoir which is available for release through the Coolidge Dam, conveyance down the channel, and diversion and use on the lands of the San Carlos Project, the water commissioner shall apportion for the ensuing irriga-

tion year to the upper valley defendants from the natural flow of the river an amount of water equal to this available storage, and shall permit the upper valley defendants to divert that amount of water from the stream, "in disregard of the aforesaid prior rights of plaintiff used on lands below said reservoir." It is provided that the defendants may divert this quantity of water in addition to their rights to take from the stream in the regular order of their priorities as established in the priority schedule (Art. V).

The decree provides for further apportionments of water from time to time throughout the year, as follows (Art. VIII (2): Decree 106; Appendix 23):

> that if and when at any time or from time to time in any year, water *shall flow into said reservoir* after said date of first apportionment *and shall be stored there and become added to the available stored water* in said reservoir, the said commissioner shall make further and additional apportionments to said defendants of the natural flow of said stream as the same is available at the diversion points of said defendants, which said apportionments shall in turn *correspond with and be equivalent in quantity to the amount of such accessions or newly available stored water supply;* that in calculating apportionments of the stored water supply the Water Commissioner shall make appropriate deductions for losses for evaporation, seepage or otherwise that may be suffered between the time of the apportionment and that of the diversion of a corresponding quantity of water from the stream; that such apportionments, corresponding with net accessions during each annual pe-

> riod after first apportionment, shall be made by said Water Commissioner at least as frequently as once per calendar month (provided accessions to stored supply have occurred during that period) and at such more frequent intervals as the conditions in his judgment may demand * * *. [Italics supplied.]

The action of the water commissioner.—In order to determine the amount of available stored water at any given time a capacity curve was prepared by making a contour map of the reservoir which shows the amount stored at each elevation of the water surface (R. 16). A continuous record of water surface elevations is maintained by an automatic water stage recorder which produces a graph showing the water surface elevation at all times. Thus, by taking the elevation shown on the graph on January 1 of each year the commissioner computed the amount of water in storage on that day by reference to the capacity curve (R. 16). He then apportioned to the upper valley defendants the right to divert from the natural flow of the stream, in addition to their regular priorities, an amount of water equal to all water then stored in the reservoir and available for release for use by the lower valley users, less deductions for estimated evaporation (R. 6–7, 15–17).

The water commissioner employed the following method in determining the additional apportionments to be made from time to time throughout the year (R. 18, 20):

> In order to determine when the water flowing into the reservoir is being stored it must be known

when there has been an increase in the amount of available stored water. There cannot be an increase in the amount of stored water in the reservoir without there being a corresponding rise in the water surface elevation, and it is possible by means of [the] water stage recorder to determine when such increases occur and the amount thereof. The graphs removed from the water stage recorder on the San Carlos reservoir are tabulated and whenever a minimum elevation is reached the time and elevation is noted. As the water is being stored the water surface rises until a maximum elevation is reached and the time and elevation is again noted. By means of these two elevations and the use of the capacity curve the volume of water stored during that period of time can be determined. A record is kept of all such increments of gain.

From the amount of newly available stored water deductions are made for estimated additional evaporation losses which were not included in the first apportionment. These evaporation losses are later computed and proper corrections are made to the amount previously apportioned.

* * * * *

The rights of the plaintiff are set forth in the decree. Certain of these rights are a right to divert the natural flow waters of the Gila River. Inasmuch as natural flow may be defined as the flow produced by nature and that would be there in nature's own condition, the plaintiff has the right to pass the waters flowing in the rivers above the dam through the reservoir to the extent of its priorities, and to use these waters for the irrigation of its lands. Such waters passed through the reservoir as natural flow cannot be

> considered an addition to the stored water contents of the reservoir and therefore a like amount of water cannot be apportioned to the upper valley defendants.
>
> However, when the senior rights of the plaintiff are being satisfied from the natural flow available and there is sufficient natural flow waters available to satisfy later priorities, the defendants are entitled to their share of this natural flow on the same basis of priorities as is the plaintiff.

Appellants' alleged grievances.—Appellants, on their own behalf and on behalf of all other owners of lands within appellant districts who use waters from the Gila River under the 1935 decree, petitioned the district court to review the action of the water commissioner in making apportionments (R. 2). They allege that they are aggrieved (R. 2) and pray that the court order the commissioner to administer the decree in the manner set forth in their petition (R. 8).

Appellants are not in disagreement with the water commissioner's method of apportionment on January 1 (R. 5–7). With respect to the subsequent apportionments, however, they allege (R. 6):

> that * * * upon making each additional apportionment to said Upper Valley Users during the period of said year, the said Commissioner should take into account and apportion an additional amount of water *equal to all water flowing into said Reservoir since the date of the last apportionment,* less an estimated allowance for seepage and evaporation and less the amount of water which, by the terms of said decree, must

> be delivered to Kennecott Copper Corporation, Joseph J. Anderson, Grady L. Herring and T. H. B. Glasspie.[3] [Italics supplied.]

They also allege that if the commissioner had made apportionments to the upper valley users in the manner outlined in the petition they would have been entitled to divert from the Gila River approximately one acre-foot more water per year for each acre of land owned by them, than was the case under the apportionments actually made (R. 7–8).

The position of the Government.—The answers of the United States to the petition[4] deny that the method of apportionment outlined in the petition is the method provided for in the decree (R. 10, 14), allege that the water commissioner has at all times apportioned and authorized the diversion of the waters of the river in accordance with the decree (R. 10–11), and allege that petitioners have received all the water to which they have been entitled (R. 11, 22). The methods which the commissioner has used in making the apportionments are set out in detail. As pointed out above, his method of making the first apportionment (R. 15–17)

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[3] The Kennecott Copper Corporation and other parties referred to are, like the Government, lower valley users, that is they divert and use the water below the San Carlos Reservoir. These parties, along with the upper valley users, were defendants in the original proceeding and their rights are defined in Articles IX and X of the decree.

[4] The United States and the water commissioner each filed a separate answer to the petition (R. 10, 12). The court, however, ordered that the answer of the water commissioner be stricken and, by stipulation, that the answer of the water commissioner be adopted as part of the Government's answer (R. 25).

does not differ from the method described in the petition (R. 5–6). His method of making the subsequent apportionments from time to time throughout the year, with which appellants disagree (R. 6–7), is described in the quotation from his answer, *supra,* pp. 8–10.

The action of the district court.—Appellants offered testimony (R. 37, 70, 80, 101) and exhibits (R. 85–100) to show their understanding of the decree at the time it was entered. The Government objected to this offer as being immaterial, in that the decree is unambiguous, and any testimony to explain or change it is inadmissible (R. 34–37, 84, 88, 97, 105). The court sustained the Government's objection throughout, and excluded the evidence (R. 35, 105, 108). In its findings and conclusions it held that the decree is clear and unambiguous (R. 27) and that the water commissioner's method of apportionment is in accordance with the decree (R. 28).

ARGUMENT

I

The decree is unambiguous and clearly provides for the method of apportionment employed by the water commissioner

1. *In making additional apportionments the commissioner must take into consideration only such water as flows into the reservoir and is added to the available stored water.*—On January 1 of each year the water commissioner ascertained the amount of water which was stored in the San Carlos Reservoir and which was capable of being released through the gates of the Cool-

idge Dam [5] and conveyed down the channel for diversion and use on the Government's San Carlos Project. He then, after making deductions for estimated evaporation and seepage, apportioned to appellants the right to divert an equal amount of water from the natural flow of the stream at points above the reservoir (R. 15–17). The water thus apportioned was in addition to the rights of the appellants to take from the stream in the regular order of their priorities (Art. VIII (2): Decree 106; Appendix 23).

In making additional apportionments to the appellants during the course of a year the water commissioner took into consideration only such water as flowed into and increased the amount of available storage in the reservoir (R. 17–20). Appellants contend that he should have taken into consideration all water which flowed into the reservoir since the date of the first apportionment (R. 6).

It is the position of the Government, and the district court held, that the decree is unambiguous and clearly provides for the method of apportionment employed by the water commissioner. The controlling provision of the decree is as follows (Art. VIII (2): Decree 106; Appendix 23):

> that if and when at any time or from time to time in any year, *water shall flow into said reservoir* after said date of first apportionment *and shall be stored there and become added to*

[5] There was necessarily a certain amount of water in the reservoir which was at a lower elevation than the outlet gates of the dam. This water, which is known as dead storage, could not be released.

> *the available stored water in said reservoir,* the said commissioner shall make further and additional apportionments to said defendants of the natural flow of said stream as the same is available at the diversion points of said defendants, which said apportionments shall in turn *correspond with and be equivalent in quantity to the amount of such accessions or newly available stored water supply.* [Italics supplied.]

The foregoing language is manifestly irreconcilable with appellants' assertion that all water flowing into the reservoir is to be made the basis of additional apportionments. Under the decree there can be no additional apportionment unless "water shall flow into said reservoir *and* shall be stored there *and* become added to the available stored water in said reservoir." Appellants' suggested interpretation renders meaningless the two conjunctive clauses. Moreover, there is no accession "or newly available stored water supply" unless there is an increase in the total amount of water stored in the reservoir which can be released through the gates of the dam.

2. *There is no foundation for appellants' contention that all water which flows into the reservoir is to be made the basis of additional apportionments.*—Because the language just discussed is so clear and unambiguous the appellants are forced to take the position that all water that flows into the San Carlos Reservoir is stored there and becomes added to the available stored water, even though the amount of water released from the reservoir has at all times been exactly equal to the amount flowing in. Thus, they state (Br. 27):

> Any water running into the reservoir becomes stored water. The lake is several miles in length and it would be impossible to convey the stream running in, through the water then in storage, out of the lake. The mere fact that an equivalent amount of water may be withdrawn at the same time as the new waters running in, does not prevent the incoming water from being stored water. It is there, stored in the reservoir, and is added to the water already stored there, and if conditions are such as to make the water available for release, it becomes added to the available stored water in said reservoir.

To put it a little differently, the contention is that all water flowing in is being stored because the Government, while releasing exactly the same quantity, is not releasing precisely the same molecules. This highly refined argument ignores familiar principles of water law and is contrary to the provisions of the decree in this case.

It is well settled that all the water which flows into a reservoir constructed in the channel of a stream does not become stored there. *Nepesta D. & R. Co.* v. *Espinosa,* 73 Colo. 302, 215 Pac. 141 (1923); *Donich* v. *Johnson,* 77 Mont. 229, 257, 250 Pac. 963, 972 (1926). The owner must allow sufficient natural flow to pass through his reservoir to satisfy the prior rights of downstream appropriators. *Donich* v. *Johnson,* 77 Mont. 229, 240–241, 250 Pac. 963 (1926); Harding, Water Rights for Irrigation (1936) pp. 33, 161. Water may be stored in a reservoir only when the flow of the stream carries more than enough water to fill the de-

mand of direct flow appropriators having superior rights. A reservoir owner may himself own a right to divert water directly from natural flow at a point below his reservoir (as does the United States under Articles V and VI (1), (3), (4), (6): Decree 14–105; Appendix 8–9, 11–18), yet this right of direct diversion from natural flow is distinct from his right to store water (decreed to the United States in Articles V and VI (5): Decree 72, 105; Appendix 16). The United States, with its storage right as of June 7, 1924, cannot store water available to it under its natural flow priorities. *Greeley Co.* v. *Farmer's Pawnee Co.,* 58 Colo. 462, 146 Pac. 247 (1915); Harding, Water Rights for Irrigation, pp. 161–162. On the other hand, the right of direct diversion from natural flow is not impaired by the fact that the water to satisfy that right has passed through a storage reservoir somewhere on its course down the stream. *Nepesta D. & R. Co.* v. *Espinosa,* 73 Colo. 302, 215 Pac. 141 (1923).

It is appellants' position that the United States does not have the right to pass the natural flow of the stream through the reservoir to satisfy its priorities. If, as they contend, all water flowing into the reservoir becomes stored there it necessarily follows that all water released from the reservoir is stored water. This is contrary to the decree which draws a careful distinction between the right of the United States to store water, and the right of the United States and other parties to divert natural flow. Article V adjudicates and sets out the priorities of all parties, including the United States, and provides (Decree 12; Appendix 2–3) that each owner,

> is entitled * * * as of the date of [his] priority to divert *from the natural flow of the stream* * * * a total amount of water not exceeding 6 acre-feet per each acre of said lands. [Italics supplied.]

Article V also provides (Decree 13; Appendix 6):

> the right of the United States, as of the year 1924, to *store* the waters of the Gila River in the San Carlos Reservoir, which is specifically defined in Article VI * * * *is of different character than the rights directly to divert from the natural flow of the stream* * * * [Italics supplied.]

The natural flow rights of the United States are further defined in Article VI (1), (2), (3), (4), and (6) (Decree 86–105; Appendix 8–18); the storage right is further described in Article VI (5) (Decree 105; Appendix 16) and this paragraph provides, in addition, for:

> the right in that relation to accomplish and control the release from said reservoir of the waters so *stored* and thus reduced to ownership, and to conduct the same down the channel of the Gila River to the Ashurst-Hayden and Sacaton diversion dams of the San Carlos Project and there to r e c a p t u r e and divert * * * the same * * * for the *supplementation* of amounts available therefor at said dams from the *natural stream flow* under plaintiff's rights as same are decreed herein. [Italics supplied.]

This same distinction is made in Articles IX and X (Decree 108–111; Appendix 27–39) where certain defendants below the reservoir are decreed the right to divert quantities of natural flow in disregard of the

plaintiff's priorities. For example, paragraph (2) of Article X (Decree 111; Appendix 37–38) provides:

> that inasmuch as the waters flowing in the Gila River at defendants' said points of diversion, during a great portion of the irrigation season, will be made up in large measure of *stored water* which has been released from the San Carlos Reservoir and is being piloted down the stream channel to the diversion dams and distributing canals of the San Carlos Project, the *natural flow* available as aforesaid to said defendants, under the limitations of said apportionment, shall be gauged by and deemed to correspond with the *natural flow* of the Gila River at the point where said stream enters the San Carlos Reservoir, * * * [Italics supplied.]

Thus, the very language of the decree by drawing a distinction between natural flow and stored water conclusively establishes that the Government has the right to pass the natural flow of the stream through the reservoir to satisfy its priorities. It necessarily follows that all water which flows into the reservoir does not become stored water.

It is submitted that the plain and unambiguous language of the decree requires the method of apportionment employed by the water commissioner.

II

The other matters upon which appellants rely do not support their contention that the decree is ambiguous

As stated above (pp. 14–15), appellants are forced to pitch their entire case on the proposition that all of the water which flows into the San Carlos Reservoir is stored there. It has been shown in Point I that the

plain and unambiguous language of Article VIII (2) completely refutes their contention. However, before concluding, the Government wishes to answer certain other arguments advanced by appellants.

They suggest (Br. 18–19) that the binding force of the decree in the instant case is somewhat lessened by the fact it was entered with the consent of the parties. However, it is settled that a consent decree has "at least the same force and effect as judgments rendered judicially upon contest or trial." *Pick Mfg. Co.* v. *General Motors Corporation,* 80 F. 2d 639, 641 (C. C. A. 7, 1935); *Bullard* v. *Commissioner of Internal Revenue,* 90 F. 2d 144, 147 (C. C. A. 7, 1937); *Utah Power & Light Co.* v. *United States,* 70 Ct. Cls. 391, 397–400, 42 F. 2d 304, 308–309 (1930). Even assuming that appellants are right in their contention that a consent decree is to be interpreted in the same manner as a contract, they recognize (Br. 14–15) that evidence to explain its meaning can only be considered if the decree is ambiguous.[6] Accordingly, they endeavor to create an ambiguity. The several matters upon which they rely will be separately discussed:

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[6] *Andrews* v. *St. Louis Joint Stock Land Bank*, 107 F. 2d 462, 467–468 (C. C. A. 8, 1939); *National Pigments & Chemical Co.* v. *C. K. Williams & Co.*, 94 F. 2d 792 (C. C. A. 8, 1938). The case of *Reed* v. *Insurance Co.*, 95 U. S. 23, 30 (1877), cited by appellants (Br. 19) is not to the contrary, because, as stated in *Union Selling Co.* v. *Jones*, 128 Fed. 672, 675 (C. C. A. 8, 1904):

"If there is uncertainty or ambiguity in the terms employed, the actual condition of things, and the position in which the parties stood at the time of making the contract, may be shown for the purpose of ascertaining the meaning of its terms. *Reed* v. *Insurance Co.*, 95 U. S. 23, 30, 24 L. Ed. 348; *Phelps* v. *Clasen*, 1 Woolw. 206, 212, 19 Fed. Cas. 445, No. 11074. That which may

1. *Paragraph 1 of Article VIII does not support appellants' contention.*—Appellants' theory appears to be that, although the decree determined the priority of the United States to large quantities of water for the irrigation of Indian lands, yet paragraph 1 of Article VIII (Decree 106; Appendix 20–22) is in the nature of a contract that the upper valley defendants should be entitled, whatever the Indian priorities may be, to continue to use the waters of the river to the same extent as they have used them before the suit was brought (Br. 18, 20–22, 44). If this were true, the United States would have gained nothing through the years of effort and large expenditures of money devoted to securing the decree. Nor can any cogent reason be given why the decree should describe the priorities of the United States so fully as it does in Articles V and VI, if in fact they were null.

A reading of the decree in its entirety discloses no basis for this theory of the appellants. Of the thirteen articles, numbers I, II, III, IV, VII, XI, XII, and XIII are not related to the question presented by this appeal. Articles V and VI adjudicate in detail all the priorities of the parties involved in the suit. They adjudicate to the United States extensive direct diversion rights and the separate right to store waters of the river. Articles VIII, IX, and X, however, are different in nature, in that they embody consensual

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be shown is frequently spoken of as the surrounding circumstances, *but it does not include the prior representations, proposals, and negotiations of a promissory character leading up to, and superseded by, the written agreement. These cannot be thus engrafted upon it.*" [Italics supplied.]

arrangements as to how the rights decreed in Articles V and VI shall be exercised.

Thus, paragraph 1 of Article VIII recites by way of preamble (Decree 106; Appendix 20–22):

> That the diversions of water from the Gila River by the so-called upper valleys defendants * * * for the irrigation of the lands described in said Priority Schedule made part of Article V hereof, since their inception have been made under rights which were and are junior and subject to certain extensive rights of plaintiff, which * * * are set down and referred to in said Priority Schedule, but are further identified and particularly described in Articles VI and VII hereof * * * that, however, plaintiff and said defendants, in recognition of the *desirability* of making it practicable for said defendants to carry on the irrigation of said upper valley lands to the extent to which the areas to which their said rights apply heretofore have been irrigated and so that the said San Carlos Act *shall enure in part to their benefit* and this suit may be compromised and settled, *have agreed that the following provisions* shall be and they are hereby embodied in this decree * * *. [Italics supplied.]

However, the *terms* of the compromise are set out in paragraphs 2 to 5 (Decree 106–107; Appendix 22–27). These paragraphs have been fully discussed in Point I (pp. 12–18, *supra*) and it is there shown that they require the method of apportionment employed by the water commissioner.

2. *The San Carlos Act neither recognized the rights which appellants claim nor abandoned the rights of the*

Indians.—Appellants quote a portion of the Act of June 7, 1924, c. 288, 43 Stat. 475, and suggest (Br. 16–17) that it constitutes a recognition by Congress that the upper valley users had made lawful appropriations and that the Indians were therefore without an adequate water supply. A reading of the act plainly discloses that it has no such effect. In fact, the report of the chief engineer of the Indian irrigation service, dated November 1, 1915,[7] which the act incorporates by reference, states (pp. 12, 93, 100) that while the rights of the Indians are believed to be superior to the rights of the whites "no attempt is made to give an opinion upon the question of what water is, as a matter of law, available for the project." It is also stated (p. 99) that "no account has been taken of the water rights * * * reserved to the United States by the * * * creation of the [Gila River] reservation, in so far as such rights exceed the water rights already used." In view of these statements in the report which Congress adopted, it cannot be said that the claims of the upper valley users were recognized or that the rights of the Indians were abandoned. These matters were left for future determination and were concluded by the original proceeding in the present case.[8]

3. *Appellants err in contending that under the water commissioner's method of apportionment they will de-*

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[7] A copy of this report has been filed with the Clerk.

[8] The 1915 report recites (p. 7) that a Board of Army Engineers had previously recommended "that suit for an adjudication of water rights along the Gila River be immediately brought in the United States district court."

rive no benefit from the San Carlos Reservoir.—Appellants argue (Br. 8, 27–28) that unless all water flowing into the reservoir is to be considered, the amount of the apportionments they receive will be subject to the Government's control. This contention is predicated upon the assumption that the United States can allow the entire natural flow of the stream to pass through the reservoir and thus prevent any water from becoming stored. The argument ignores paragraph 4 of Article VIII which provides (Decree 107; Appendix 26):

> That water released at the will of the plaintiff and for the purposes of the plaintiff from the San Carlos Reservoir at any time after the date of this decree other than for the proper irrigation of 80,000 acres of land or its equivalent in the San Carlos Project, shall be considered as stored in the San Carlos Reservoir at and after the date of such releases, and available as a basis for the above described apportionment of the natural flow to said defendants as it would be if such withdrawals had never been made.

Appellants' argument also ignores the fact that the Government's right to divert natural flow water, like the right of any other appropriator, is limited to the amount needed for beneficial use (Decree 112; Appendix 39). Under the decree the Government cannot, and of course would not, allow water to flow through the reservoir and run to waste.

Clearly, under the method of apportionment employed by the water commissioner, the San Carlos Reservoir *inures in part* to the benefit of the upper valley users. For every acre-foot of water stored by the

United States to supplement its natural flow rights, an equal amount of water is apportioned to the appellants. Such apportionments are *in addition to* their rights to draw upon the natural flow under their priorities and are *in disregard* of the prior rights of the Government.

CONCLUSION

It is submitted that the decision of the district court should be affirmed.

Respectfully,

NORMAN M. LITTELL,
Assistant Attorney General.
FRANK E. FLYNN,
United States Attorney, District of Arizona.
H. S. MCCLUSKEY,
CHARLES R. DENNY,
W. ROBERT KOERNER,
Attorneys, Department of Justice.
GERAINT HUMPHERYS,
District Counsel, United States Indian Field Service,
Of Counsel.

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